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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT SANDOVAL, Defendant and Appellant.	B205326 (Los Angeles County Super. Ct. No. KA076520)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mike Camacho, Judge. Affirmed.

Judith Khan, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Sarah J. Farhat, Deputy Attorneys General for Plaintiff and Respondent.

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Appellant Robert Sandoval was convicted of the second degree murder of Christopher Inouye (count 1) and the mayhem of Clair Chang (count 2), with enhancements for firearms discharge and infliction of great bodily injury. He was sentenced to a total of 69 years to life in prison. He contends that the trial court should not have given Judicial Council of California Criminal Jury Instructions (2006-2007) CALCRIM No. 361, which concerns a defendant's failure in his testimony to explain or deny evidence against him.

We find no prejudicial error and affirm.

FACTS

1. Prosecution Evidence

In July 2006, appellant was hired as a private security officer by Omni International Security Company, which also owned a security firm called "L.A. Housing Authority." Appellant was 21 years old at that time. His duties involved patrolling private apartment complexes. He wore a uniform at work and carried a badge identifying him as a security officer for L.A. Housing Authority. He had a firearms permit and was allowed to carry exposed firearms while on duty. He sometimes worked with another security officer, Christopher Navarro. Neither appellant nor Navarro worked for the Los Angeles Police Department (LAPD).

On the evening of September 22, 2006, appellant arrived in his truck at the home of his cousin, Ralph Acero, who was a prosecution witness at the trial. Appellant showed Acero a .40-caliber handgun that was hidden under the driver's seat. They drove to a bar in West Covina, where they both consumed alcoholic beverages. They left the bar around midnight and drove to meet Navarro at a T.G.I. Friday's restaurant (the restaurant) in the City of Industry.

Appellant and Acero met in the bar area of the restaurant with Navarro, Navarro's sister Stephanie Navarro, and a female friend of Stephanie's. Appellant and Acero were drinking beer. Around 1:15 a.m., Jerry Sisneros, the restaurant's manager, noticed appellant and Navarro in the bar area, dressed in civilian clothing, with drinks in front of

them. Around 1:30 a.m., Sisneros overheard appellant say, "We're both L.A.P.D. We pretty much do whatever we want."

About 1:45 a.m., shortly before closing time, appellant and his four companions left the restaurant and stopped to say goodbye in front of it. They saw a lone man running through the parking lot pursued by a hostile group of people. Appellant, Acero, and Navarro decided to help the lone man. The two women stayed behind while the three men walked toward the angry group. During the ensuing events, appellant retrieved the gun from the truck and shot the two victims. There was conflicting evidence about why and how those shootings occurred.

We skip back in time to a little earlier that evening, when an informal reunion of school friends was in progress in the patio area of the restaurant. James Valdez, Caesar Alvarado, and Jose Pena went there to see their friend, Clair Chang, who later became the mayhem victim. Alvarado was already drunk when he arrived. The only people he knew at the patio were Valdez, Pena, and Chang. He sat at one end of a table with Valdez, Pena, and a friend of Chang's named "Ivan." Chang sat at the other end of the table with a group of Ivan's friends. That group included Christopher Inouye, who later became the murder victim, Kevin Smith, Shaun Fernandez, Jorge Martinez, Jason Montes, "Cory," some other men, and some women. Many of Ivan's friends testified at the trial. Some of them drank alcoholic beverages that night, but Chang had only a sip of beer, and Smith drank no alcohol at the restaurant, as he was a "designated driver."

At their side of the table, Ivan and Valdez got into a fight when a playful slap escalated into real slapping and pushing. To assist his friend Valdez, Alvarado punched Ivan in the face. Ivan fell to the ground. Alvarado and Valdez left the patio and started running toward the parking lot. Ivan told his friends that Alvarado punched him, and said, "Let's go get him." Ivan and a group of his friends, including Inouye, left the patio and chased Valdez and Alvarado. Chang, who was friends with both Alvarado and Ivan, followed them, as did some onlookers. As many as 20 people went into the parking lot, including seven to 12 who were actually pursuing Alvarado.

Alvarado tripped twice and fell to the ground as he ran from the angry mob. Several members of the group, including Ivan and Inouye, kicked and punched him when he was down. Inouye, who was five feet 11 inches tall and weighed 201 pounds, removed his shirt at some point.

The second time Alvarado was down, Chang stopped the assault by pushing the men away, covering Alvarado's body with his own, and announcing that Alvarado was his friend and had already been sufficiently punished for punching Ivan. The group began to disperse. Chang helped Alvarado to his feet and asked him if he was all right. Suddenly, Chang and Alvarado heard a gunshot. Alvarado ran from the parking lot. Chang turned around and saw appellant standing five feet away from him. Appellant immediately shot Chang in the groin area. Later, Chang learned that appellant had already shot Inouye.

At the trial, Ivan's friends filled in facts that Chang and Alvarado did not know. They basically testified that, after the assault on Alvarado ended, appellant fired two rounds into the air. He then pointed the gun at some of Ivan's friends, walked over to Inouye, and shot him once in the neck. Then, he walked 15 to 20 feet to Chang, shot Chang, and went back toward his truck. As he passed Ivan's friend Montes, he pointed the gun at Montes's torso and said, "[W]hat are you going to do?" He then got into his truck with Acero and sped off. Two of the witnesses noted the license number of the truck and gave it to sheriff's deputies. After appellant left, Navarro approached, holding a gun and a badge, and told the people who were trying to help Inouye and Chang that he was with the LAPD. They ignored him.

Ivan's friends did not mention that appellant's companions were assaulted in the parking lot. There was prosecution testimony to that effect from Sisneros, the restaurant's manager, and Acero, appellant's cousin.

Sisneros came outside when he heard that there was a fight in the parking lot. He saw appellant's friend Navarro on the ground, surrounded by six to eight men. Two or three of the men were striking Navarro with closed fists and kicking him. Navarro was curled in a fetal position, trying to protect himself. Sisneros told his employees to dial

911. He watched as appellant pulled people away from Navarro and helped Navarro to stand up. The people stopped attacking Navarro at that point, but they were yelling, and appellant was yelling back at them. Appellant left Navarro behind, ran to a pickup truck, and retrieved a handgun. He cocked the gun as he ran back toward the crowd. It took him about 15 seconds to retrieve the gun. The fighting was over at that point. He aimed the gun in the direction of Inouye and two men who were standing 10 or 15 feet from Inouye. Inouye was swinging his shirt and yelling something that Sisneros could not hear. Appellant fired three or four times. The second shot hit Inouye, who fell to the ground. Appellant then ran to his truck and drove away.[1]

Acero testified that, as he approached the hostile group of men, he lost sight of appellant and Navarro. Two bottles suddenly hit Acero in the back of the head and in the face, causing a concussion. He stopped running and stood still. He heard three or four gunshots. Appellant approached, holding the gun, and said, "Let's go." They left together in appellant's truck. As they drove toward Acero's home, appellant took a telephone call on the truck's speaker phone. The caller said someone had been killed. Acero did not hear appellant's response. He asked appellant what happened at the restaurant. Appellant responded, "Nothing." After appellant dropped him off, Acero called a friend who was a police officer, and soon provided the police with a description of the events.

Appellant was arrested at his home later that morning. His truck was parked nearby. He told a sheriff's deputy that his handgun was in the living room. The deputy retrieved the gun. It fired the bullet that killed Inouye. The cause of death was a single gunshot to the neck, just below the ear.

Chang's gunshot went through his penis and left testicle before exiting through the back of his leg. He needed multiple surgeries, including surgical removal of the testicle, and had to use a catheter for months. At the time of the trial, he still had problems with pain and with using his penis for its normal functions.

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[1] Sisneros apparently did not see the shooting of Chang.

2. Defense Evidence

A. Christopher Navarro

Navarro arrived at the restaurant around midnight and stayed there until closing time with his sister and her friend. Appellant and Acero met them there, 30 to 40 minutes before closing time. When the five of them went outside, they saw that a group of people was knocking a man down and hitting him. Acero suggested that he, appellant, and Navarro should help the man. Acero ran toward the group. Navarro followed Acero. Appellant was behind Navarro, so Navarro did not see what he did.

Navarro watched as Acero ran up to Inouye, who was beating the man on the ground. Acero struck Inouye with his fist. Inouye hit Acero back. Acero fell to the ground. Navarro ran toward Acero, yelling things like, "Hey, we're not involved," and "We're trying to break up the fight." The fighting continued. Navarro accidentally knocked down a girl who jumped in front of him. Inouye accused Navarro of hitting the girl. Navarro pulled out his wallet, showed his security badge, and repeated that he and Acero were only trying to break up the fight. Inouye cursed, approached Navarro, and put up his fists to fight him. Navarro tried to run away. He was struck on the head, fell to the ground, and was surrounded by eight to 10 men who were kicking him all over. Fearing for his life, he made himself into a ball and tried to cover his face. He heard two groups of shots fired. The kicking stopped after the second sequence of shots. He got up, ran toward his car, passing appellant, and retrieved his gun. People approached and asked for help for their wounded friend. He saw that the person was the man who had hit Acero. He told the people that the shooting could have been avoided if they had listened to him. He tried to tell the sheriff's deputies what happened, but they would not listen to him. He went to appellant's home afterwards and told him that a person had died. Appellant told him "he had to shoot somebody," as people had been kicking Navarro in the head.

B. Stephanie Navarro

When Stephanie left the restaurant with appellant, Acero, her brother Navarro, and her girlfriend, she saw the man who was being beaten by the pursuing group. Acero said,

"Let's go do something," and ran off toward the group. Stephanie told Navarro not to get involved, but he ignored her advice and ran off after Acero. Appellant followed Navarro. Stephanie did not see what appellant did, as she kept her eyes on Navarro.

Stephanie then observed that Acero was on the ground, grabbing his head. There were people around him, and someone was kicking him. Navarro picked Acero up and yelled, "Break it up." Navarro started to run. Someone hit him in the back of the head, and he fell to the ground. Eight to 10 men encircled him and began to kick him in the head. He put his hands over his face. Stephanie heard two or three shots, a pause, and more shots. When the shots stopped, Navarro was still on the ground, but the people who had been around him had moved to a person who had been shot. That person was one of the people who had been striking and kicking Navarro. Navarro got up, ran back to Stephanie and her friend, and got his gun. Someone in the group ran over and asked for help. Navarro responded, "I tried to help you. You guys decided to beat me. Now look what happened." Stephanie eventually persuaded Navarro to leave.

C. Appellant

Appellant was 22 years old when he testified in November 2007. He had never been arrested or charged with a crime before.

He reported for work on the evening the shootings occurred, but then discovered that he did not have to work, as there had been a scheduling mix-up. He drove to his cousin Acero's home, bringing with him the gun he used at work. He had a firearms permit but did not own a gun, so Navarro had loaned him that one. He went with Acero to a bar in West Covina, where they both consumed three to four bottles of light beer. They left the bar around midnight and drove to the restaurant to give Navarro the checks. Appellant had removed his uniform shirt and was wearing a white T-shirt and jeans. They joined Navarro, his sister, and her friend in the bar area of the restaurant. Appellant and Acero continued to drink light beer. Appellant never said that he was LAPD or that he was a "cop" who could do whatever he wanted.

At closing time, appellant and his companions went outside. They saw that a crowd of people was chasing a man and punching and kicking the man when he was

down. One of the people yelled, cursed, and took off his shirt. Acero, Navarro, and appellant decided to help the man. Acero ran off first. Navarro and appellant followed. Appellant lost sight of Acero and was about 10 feet behind Navarro.

As appellant ran, he saw three or four people run to their vehicles in the parking lot and then run back to the group. Appellant thought the people were retrieving weapons from their vehicles. He ran to get his gun from his truck. He retrieved the gun, put the magazine into it, "racked the round," and "discharged two rounds in the air." He fired those shots because he feared that the man who was being beaten on the ground might be seriously injured or killed. He personally had been beaten by a group of six people, so he knew what it felt like.

Appellant then started running toward the group of people. He observed that, "25 to 30 feet away from the first group," a second group of people was using fists and feet to beat up another man who was on the ground. When he reached the first group, someone hit him in the front of the neck with an object. He hunched over. When he stood straight up, he saw a person coming toward him, holding a shiny object that resembled a knife. He told the person to freeze. When the person did not freeze, he fired a shot toward the person's left leg. He was not sure if he shot that person. Then, he turned and saw the shirtless man "stomping" on Navarro's head. The man looked at him and reached for an object in his pants pocket. The object looked "like the butt of a gun." Appellant fired one round, but he did not see the person go down.

Appellant then heard two or three more shots being fired. He ran toward his truck and drove off with Acero. Acero's face was injured, but he said he was all right. Appellant spoke with Navarro on the phone and learned that Navarro and his sister were also fine. He did not recall that Navarro said anything else. He took Acero home and then drove to his own home. Navarro arrived there and told him that someone might have died. He and Navarro were talking about contacting the police when police officers arrived and arrested him.

During his testimony, appellant also discussed in detail the numerous discrepancies between his trial testimony and his recorded statement to homicide

detectives following his arrest. For example, he said he initially lied to the detectives about having a gun that night, as he was scared and had trouble taking responsibility for killing someone. He told the detectives he only shot at one person because he did not know how many shots he fired. He did not tell the detectives that people ran to their cars to retrieve weapons, but he really did believe that. He admitted previously socializing with Navarro at the restaurant, but denied telling any of the employees there that he was an officer of the LAPD. He was positive that both Chang and Inouye had held "[s]ome sort of an object" that could be used "as a weapon."

3. Prosecution Rebuttal Evidence

On an earlier occasion, prior to the night of the shootings, appellant and Navarro talked in the bar area of the restaurant with the bartender, Ilir Lee Zymberi. Flashing badges, they told Zymberi that they worked for the LAPD.

On the night of the shootings, Zymberi was on the patio and saw Alvarado being beaten in the parking lot. He also observed appellant and Navarro begin to walk toward the hostile group. He went into the restaurant, reported the fight, and then went outside and continued watching. He heard two or three gunshots. Multiple fights were in progress at that point, but no one was on the ground. He heard another gunshot and saw a person on the ground. Between 10 to 20 seconds, there was another gunshot. Another person fell to the ground, yelling for help and holding his groin area. Appellant ran to his truck and drove off quickly. Zymberi later saw Navarro with a gun, in front of the restaurant. Zymberi told Navarro to put the gun away. Navarro said he was "just trying to help out."

The prosecution also introduced the tape of the detectives' interview with appellant. Appellant initially insisted that he dropped the gun off at his house before he went out that night. Then, he said the gun was in his truck, and he retrieved it when 15 or 17 people were attacking Navarro, his partner. He later said he immediately went to his truck before he approached the people, as there were too many of them. Appellant explained during the interview that he fired two rounds in the air, but people continued to hit Navarro. The shirtless person, who had already struck appellant, Navarro, and Acero,

picked up his pants leg, and removed a metallic object that might have been a "little knife." Appellant did not know what the person was going to do, so he shot him one time. He thought he fired a total of three shots. He did not know that a second person was shot.

DISCUSSION

Appellant contends that the trial court committed prejudicial error by giving CALCRIM No. 361. As appropriately modified for gender, the version of that instruction the jury received stated: "If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure."

A preliminary question is whether appellant may raise this issue on appeal, as there was no objection at the trial court level.

CALCRIM No. 361 was not one of the original instructions the court discussed with counsel. After both sides rested, the trial court told counsel that, based on the testimony it had heard, it believed it also had to give CALCRIM Nos. 361 and 362. After reviewing those instructions, the prosecutor and defense counsel both said they had no objection.

Despite the lack of an objection, the issue regarding CALCRIM No. 361 was not waived, as an "appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (Pen. Code, §§ 1259, 1469; see also *People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 103, fn. 34.) We therefore proceed to the merits.

CALCRIM No. 361 is based on Evidence Code section 413, which states in pertinent part: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure

to explain or to deny by his testimony such evidence or facts in the case against him . . . ."

The predecessor to CALCRIM No. 361 was CALJIC No. 2.62. It stated: "In this case defendant has testified to certain matters. [¶] If you find that [a] [the] defendant failed to explain or deny any evidence against [him] [her] introduced by the prosecution which [he] [she] can reasonably be expected to deny or explain because of facts within [his] [her] knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable. [¶] The failure of a defendant to deny or explain evidence against [him] [her] does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] *If a defendant does not have the knowledge that* [*he*] [*she*] *would need to deny or to explain evidence against* [*him*,] [*her*,] *it would be unreasonable to draw an inference unfavorable to* [*him*] [*her*] *because of* [*his*] [*her*] *failure to deny or explain this evidence*." (Italics added.)

Appellant emphasizes that CALCRIM No. 361 does not include the final sentence of CALJIC No. 2.62, which is italicized above. He argues that (a) CALCRIM No. 361 is constitutionally infirm, as the omission of the italicized sentence impermissibly lightened the prosecution's burden of proof, (b) there was no evidentiary basis for giving CALCRIM No. 361, as there were no facts that he failed to explain or deny, and (c) the instruction caused him prejudice.

People v. Saddler (1979) 24 Cal.3d 671, 680-681 (*Saddler*), held that there was no constitutional infirmity in CALJIC No. 2.62. We follow that holding and further find no constitutional problem with the subsequent version of the instruction, CALCRIM No. 361. The instruction does not lighten the prosecution's burden of proof and, in fact, reminds the jurors of that burden.

On the other hand, when appellant testified, he attempted to explain or deny all of the evidence. We do not see anything that he failed to explain or deny. He contradicted

other evidence, but "a contradiction is not a failure to explain or deny" that justifies giving the instruction. (*Saddler, supra*, 24 Cal.3d at p. 682; see also *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469.) We therefore find that there was no evidentiary basis for CALCRIM No. 361, so the trial court erred in giving it. We further find, however, the error caused no prejudice, whether we apply the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, or *Chapman v. California* (1967) 386 U.S. 18, 24.[2]

The jury was instructed to disregard any instructions that did not apply. We presume that the jury followed that instruction. (*Saddler*, *supra*, 24 Cal.3d at p. 684; see also *People v. Haynes* (1983) 148 Cal.App.3d 1117, 1122.)

A finding of no prejudice is further justified by the nature of the evidence. There was repeated testimony that Inouye and Chang were unarmed, and the chaotic fighting in the parking lot was over before appellant walked up to Inouye and Chang and shot them. Appellant was the only person who used a gun. The assaults on Alvarado, Acero, and Navarro involved fists, feet, and bottles, rather than guns and knives. There was nothing in the nature of those assaults that justified appellant's actions toward Inouye and Chang.

Appellant testified at the trial, but did not tell the detectives, that he saw people going to their cars in the parking lot, and believed those people were retrieving weapons. He further testified that (a) he fired a shot toward the leg of a person he saw coming toward him, because that person was holding an object that resembled a knife, and (b) he

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[2] As appellant recognizes, in *Saddler*, *supra*, 24 Cal.3d at page 683, the California Supreme Court used the standard of *People v. Watson*, *supra*, 46 Cal.2d at page 836, to determine the prejudice from error in giving CALJIC No. 2.62. Appellant argues, however, that the appropriate standard is that of *Chapman v. California*, *supra*, 386 U.S. at page 24, because CALCRIM No. 361 violated his federal constitutional right to due process of law. We find no due process violation in use of the instruction, but in any event, there was no prejudice, under either test. Appellant further argues that harmless error analysis is inappropriate, as the error rose to the level of structural error, under *Martinez v. Garcia* (9th Cir. 2004) 379 F.3d 1034, 1041. We disagree, as the instructional error was not so serious that it amounted to a structural defect.

then fired a shot at the shirtless man who was assaulting Navarro because that man was reaching for an object that looked like a gun.

Inouye was the shirtless man, so the first person appellant described had to be Chang, even though the other evidence showed that Chang was the second person appellant shot. It made no sense that Chang, the sober peacemaker, would rescue Alvarado from the angry mob and then suddenly attack appellant with a knife. It also was incredible that Inouye would reach for a gun to attack appellant, when Inouye had not reached for a gun when he was attacking Alvarado, with whom he was furious. The reasonable inference was that appellant lied about other people having weapons to justify his own use of a gun.

Moreover, appellant testified that the shirtless man appeared to have a gun, but told the detectives that the shirtless man appeared to have a knife. He also told the detectives that he did not know that a second person was shot, which contradicted his explanation at the trial of why he shot that person. The differences between his versions of what happened provided a strong reason to discredit his self-serving testimony, in addition to its incredible nature and its conflicts with the testimony of the other witnesses. We therefore conclude that the error in giving CALCRIM No. 361 caused no prejudice.

DISPOSITION

The judgment is affirmed.

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FLIER, J.

We concur:

RUBIN, Acting P. J. BIGELOW, J.